RAMALINGAM RASARATNAM

v.

SELLAM NADARAJAN

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS NO: 24-728-2003]
16 FEBRUARY 2004

LAND LAW: *Caveat - Private caveat - Removal of private caveat by court - Whether plaintiff had locus standi to file application - Whether plaintiff an aggrieved person - Whether plaintiff had a caveatable interest - Whether there was a serious question to be tried - Balance of convenience - National Land Code 1965, ss. 323(1)(a), (b), 327(1)*

WORDS & PHRASES: *"any person … aggrieved" - National Land Code 1965, s. 327(1)*

This was an application by the plaintiff for an order that a private caveat entered by the defendant on the plaintiff's land be removed under s. 327(1) of the National Land Code 1965 ('NLC'), and for damages to be assessed. The defendant, pursuant to a sale and purchase agreement with the plaintiff ('the agreement'), had paid a consideration of RM1,850 ('the amount') to buy 3450 square feet of the plaintiff's land. Upon the plaintiff being adjudicated a bankrupt, the defendant filed the proof of debt of the amount and did not accept the plaintiff's attempt to settle the debt on the ground that it was insufficient. The Director General of Insolvency ('DGI') made a discharge order in favour of the plaintiff. The defendant entered the private caveat in 1999 and also filed a civil suit for specific performance against the plaintiff in 2003. The land was presently in the name of the DGI and not in the plaintiff's name. The issues requiring determination were: (i) whether the plaintiff had *locus standi* to file this application; and (ii) whether the private caveat should be removed.

Held:

[1] The fact that the DGI was the registered owner of the land did not *ipso facto* preclude the right of other parties, such as non-registered owners, to apply for the removal of a private caveat. The expression "any person … aggrieved" in s. 327(1) of the NLC is sufficiently wide enough to include any person who, although not the registered owner of the land, is aggrieved. The plaintiff herein was the original registered owner whose land was vested in the DGI on the ground of his being adjudicated a bankrupt, but had not been re-registered as the owner, as a result of which, the land, at least

in equity, was vested in the defendant. In the circumstances, the plaintiff was a person aggrieved by the existence of the private caveat under s. 327(1) of the NLC and therefore had the *locus standi* to apply to the court for an order for its removal. (p 490 a-f)

[2] On the facts, the defendant was one of the beneficiaries to the land pursuant to the agreement; thus, it was clear that the defendant had a caveatable interest under s. 323(1)(a) or (b) of the NLC. The defendant had also shown that his claim raised a serious question to be tried *ie*, whether the agreement was specifically enforceable in order to entitle the defendant to the equitable remedy of specific performance. Finally, in order to maintain the substratum and subject matter of the civil suit, the balance of convenience or justice clearly lay in favour of the caveat remaining on the register pending the final disposal of the civil suit. Hence, the plaintiff's contention that the private caveat should be removed was devoid of merits. (pp 491 b, 492 b-f)

[Application dismissed.]

Case(s) referred to:

Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd [1996] 2 CLJ 561 FC ***(refd)***

Chieng Hock Wong v. Lim Guan Liong [2003] 6 MLJ 477 ***(refd)***

Chor Phaik Har v. Farlim Properties Sdn Bhd [1997] 4 CLJ 393 FC ***(refd)***

Eng Mee Yong & Ors v. V Letchumanan [1979] 2 MLJ 212 ***(refd)***

Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh [1974] 1 MLJ 145 ***(refd)***

Jasalam (M) Sdn Bhd v. Wong Koon Yee [2000] 2 CLJ 377 HC ***(refd)***

Kasivisvanathan Chettiar v. Pereira [1976] 2 MLJ 110 FC ***(refd)***

Kho Ah Soon v. Duniaga Sdn Bhd [1996] 2 CLJ 218 SC ***(refd)***

Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd [1999] 2 CLJ 633 CA ***(refd)***

Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 2 CLJ 713 CA ***(foll)***

Macon Engineers Sdn Bhd v. Goh Hooi Yin [1996] 2 MLJ 53 ***(refd)***

Malite Sdn Bhd v. Abdul Karim Gendut [1981] 2 MLJ 29 FC ***(refd)***

Medan Juta Sdn Bhd v. Tsoi Ping Kwan [1996] 1 MLJ 864 HC ***(refd)***

Murugappa Chettiar Lakshmana v. Lee Teck Mook [1995] 1 CLJ 545 CA ***(foll)***

PB Securities Sdn Bhd v. Autoways Holdings Bhd [2000] 4 CLJ 811 CA ***(refd)***

Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd [1998] 2 CLJ Supp 96 HC ***(refd)***

Registrar of Titles, Johore v. Temenggong Securities Ltd [1976] 2 MLJ 44 ***(refd)***

Sabah Finance Berhad v. Addspeed Enterprises Sdn Bhd & Ors [1995] 4 CLJ 645 HC ***(refd)***

Temenggong Securities Ltd & Anor v. Registrar of Titles, Johore & Ors [1974] 2 MLJ 45 ***(refd)***
Tengku Mohamed Zairuddeen Tengku Mohamed Zaid v. Wazuraiyah Mohamad and Wazuraiyah Mohamed v. Megat Najmuddin & Ors [1988] 1 MLJ 27 ***(refd)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20 FC ***(refd)***
United Malayan Banking Berhad lwn. Chew Chee Sun [1996] 3 CLJ 533 HC ***(refd)***
Wu Shu Chen & Anor v. Raja Zainal Abidin Raja Hussin [1997] 3 CLJ 854 CA ***(foll)***

Legislation referred to:
Bankruptcy (Amendment) Act 2003, s. 2
Limitation Act 1953, s. 9
National Land Code 1965, ss. 323(1)(a), (b), 327(1), 349(1), (2), (3), 350

Other source(s) referred to:
Judith E Sihombing, *National Land Code, A Commentary*, 1981, p. 330

For the plaintiff - Anthony Joseph Param; M/s Muthuvelu Param Rosdin & Co
For the defendant - R Sivanesan; M/s Sivanesan Ram & Co

Reported by Suresh Nathan

JUDGMENT

Low Hop Bing J:

Application

This is the plaintiff's application in encl. (3) for an order that the private caveat entered by the defendant *vide* presentation No. 26/1999, Jilid 36, Folio 61 dated 23 February 1999 ("the private caveat") on the plaintiffs land held under GM 65, P.T. No. 616, mukim of Rasah, district of Seremban, ("the land") be removed under s. 327(1) of the National Land Code 1965 and for damages to be assessed.

For brevity and convenience, a reference to any section is a reference to that section in the National Land Code 1965 unless the context otherwise requires.

Factual Background

The plaintiff was, prior to his being adjudicated as a bankrupt, the registered owner of the land.

On 15 December 1976, the plaintiff and the defendant entered into a sale and purchase agreement ("the agreement") to buy 3450 sq. ft. of the land at a consideration of RM1,850 ("the amount") which has been duly paid by the defendant to the plaintiff.

The plaintiff was adjudicated as a bankrupt on 8 October 1984, whereupon the defendant filed the proof of debt for the amount.

On 23 January 1999, the plaintiff took steps to discharge himself as a bankrupt by settling all the debts including the amount but this was not accepted by the defendant on the ground that it was insufficient.

On 12 November 1998, the Official Assignee (now known as the Director General of Insolvency pursuant to s. 2 of the Bankruptcy (Amendment) Act 2003 (Act A197) with effect from 1 October 2003) ("DG of Insolvency") made a discharge order in favour of the plaintiff.

The defendant entered the private caveat on 23 February 1999 and filed High Court Seremban civil suit No. 22-187-2003 ("the civil suit") for, *inter alia*, specific performance against the plaintiff in October 2003.

The land is presently in the name of the DG of Insolvency and not in the plaintiff's name.

Submission For Plaintiff

Anthony Joseph Param, learned counsel for the plaintiff, submitted that under s. 327(1) any person aggrieved by the existence of a private caveat may apply for its removal. Support for this contention was sought in *Wu Shu Chen (Sole executrix of the estate of Goh Keng How, deceased) & Anor v. Raja Zainal Abidin bin Raja Hussin* [1997] 3 CLJ 854.

He added that the defendant must prove that he has a caveatable interest under s. 323, and that by filing proof of debt, the defendant has elected to make a monetary claim and not in relation to the land, as a result of which, upon the settlement of the amount by the plaintiff to the defendant, the defendant ceased to have caveatable interest, since the defendant could not approbate and reprobate, relying on *PB Securities Sdn Bhd v. Autoways Holdings Bhd* [2000] 4 CLJ 811; *Sabah Finance Berhad v. Addspeed Enterprises Sdn Bhd & Ors* [1995] 4 CLJ 645; *United Malayan Banking Berhad lwn. Chew Chee Sun* [1996] 3 CLJ 533.

It was stressed that the defendant's monetary claim could give rise to no caveatable interest, on the basis of *Kundang Lakes Country Club Bhd v. Garden Masters (M) Sdn Bhd* [1999] 2 CLJ 633.

Further, he said that the claim was barred by s. 9 of the Limitation Act 1953, deriving support from *Wu Shu Chen, supra*, and that the plaintiff having accepted the amount did not become a bare trustee for the defendant. *Borneo Housing Mortgage Finance Bhd v. Time Engineering Bhd* [1996] 2 CLJ 561; *Temenggong Securities Ltd. & Anor v. Registrar of Titles, Johore & Ors* [1974] 2 MLJ 45 were cited in support.

It was also argued that the defendant must show that on a balance of convenience, the private caveat should remain until final disposal of the civil suit, and that there was delay on the part of the defendant in filing the writ for, inter alia, specific performance against the plaintiff in October 2003, when the caveat was entered by him on 23 February 1999. *Registrar of Titles, Johore v. Temenggong Securities Ltd* [1976] 2 MLJ 44; *Eng Mee Yong & Ors v. V Letchumanan* [1979] 2 MLJ 212; and *Jasalam (M) Sdn Bhd v. Wong Koon Yee* [2000] 2 CLJ 377 were relied upon.

Contention For Defendant

En R Sivanesan, learned counsel for the defendant, took the stand that as the land is now in the name of the DG of Insolvency, s. 349(1), (2) and (3) and s. 350 would apply so that the plaintiff has no *locus standi*. He relied on *Tengku Mohamed Zairuddeen Bin Tengku Mohamed Zaid v. Wazuraiyah Bte Mohamad and Wazuraiyah Bte Mohamed v. Megat Najmuddin & Ors* [1988] 1 MLJ 27; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1997] 4 CLJ 393; and *Chieng Hock Wong v. Lim Guan Liong* [2003] 6 MLJ 477.

He stressed that the plaintiff is not an aggrieved person under s. 327(1) but the DG of Insolvency is.

Alternatively, it was contended that the defendant has a caveatable interest, pursuant to s. 323(1)(a) and (b), relying on *Inter-Continental Mining Co. Sdn. Bhd. v. Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145.

It was then argued that s. 9 of the Limitation Act 1953 and the concept of bare trustee do not apply here, and a dozen cases were cited in support.

He ended his submission by saying that on a balance of convenience, the status quo should be maintained until the final disposal of the civil suit. *Eng Mee Yong, supra,* was relied on.

Decision Of The Court

Issues For Determination

With the utmost respect to respective learned counsel, their submissions have travelled far and wide to cover some issues which were clearly irrelevant to the issues that arise for determination in the matter here, which is an application for removal of a private caveat.

So far as I am concerned, on the facts alluded to above, the issues for determination are:

1. whether the plaintiff has *locus standi* to file this application; and

2. whether the private caveat should be removed.

Does Plaintiff Have Locus Standi?

Since s. 349(1), (2) and (3) and s. 350 have been relied upon by the defendant to support the contention that the plaintiff has no *locus standi*, it is necessary to reproduce these provisions as follows:

> 349 Registration of Official Assignee
>
> (1) Where the Official Assignee claims any land, or share or interest in land, under any written law for the time being in force relating to bankruptcy, he may apply to the Registrar under this section for the registration thereof in his name, and the Registrar shall give effect to the application by endorsing a memorial of the transmission on the register document of title to the land in question or, as the case may be, the land in which the share or interest in question subsists.
>
> (2) Every such memorial shall be signed and sealed by the Registrar, and a copy thereof shall, if he is able to secure its production, be made by him on the issue document of title to the said land or, where the memorial relates to a lease or charge, on the duplicate thereof.
>
> (3) No land, share or interest shall vest in the Official Assignee under any adjudication of bankruptcy, or order for administration in bankruptcy, until it has become registered in his name pursuant to this section.
>
> 350 Effect of disclaimer, discharge, etc
>
> No disclaimer by the Official Assignee, and no order for the discharge of any bankrupt or the annulment of any adjudication of bankruptcy, shall operate to divest the Official Assignee of any land, share or interest registered in his name, and any such land, share or interest shall continue vested in him until the registration of a transfer thereof, or of any vesting order made with respect thereto by the Court.

Section 349 prescribes the procedure and the effect of registration of the DG of Insolvency in order to constitute the DG of Insolvency as the registered owner in the circumstances stipulated therein.

The factual background as alluded to above reveals that the DG of Insolvency has already been registered as the owner of the land, pursuant to s. 349(3) above. There is no dispute about that.

Section 350 provides, *inter alia*, that no order for the discharge of any bankrupt or the annulment of any adjudication order of bankruptcy shall operate to divest the DG of Insolvency of any land. There is again no dispute about that, as the DG of Insolvency was quite content not to be present to challenge the right of the plaintiff to file the application herein.

The fact that the DG of Insolvency is the registered owner of the land does not *ipso facto* preclude the right of other parties, such as non-registered owners, to apply for the removal of a private caveat, which is governed by s. 327(1), where relevant, in the following words:

> 327 Removal of private caveats by the Court
>
> (1) Any person aggrieved by the existence of a private caveat may at any time apply to the Court for an order for its removal.

The expression "any person aggrieved" is in my view sufficiently wide to include any person who is not the registered owner of the land, but must be a person aggrieved. In *Wu Shu Chen, supra*, Mokhtar Sidin JCA, in delivering judgment of the Court of Appeal, explained that:

> The word 'aggrieved' must be given its ordinary meaning. To be aggrieved means one is dissatisfied with or adversely affected by a wrongful act of someone. An aggrieved person is therefore a person whose legal right or interest is adversely affected by the wrongful act or conduct of another person or body. The category of aggrieved persons is never closed.

The plaintiff herein is the original registered owner whose land was vested in the DG of Insolvency on the ground of his being adjudicated as a bankrupt, but has not been re-registered as the owner, as a result of which, the land, at least in equity, is vested in the defendant: see *National Land Code, A Commentary*, 1981 by Judith E Sihombing at p. 330.

In the circumstances, I have no hesitation in holding that the plaintiff is a person aggrieved by the existence of the private caveat under s. 327(1) and therefore has the *locus standi* to apply to the court for an order for its removal. The defendant's contention that the plaintiff has no locus standi is misconceived and is hereby overruled.

Whether Caveat Should Be Removed?

The answer to this issue depends on whether the defendant has a caveatable interest on the basis of the factual background as alluded to above. In this respect, I am guided by the principles enunciated by the Court of Appeal in *Murugappa Chettiar Lakshmana v. Lee Teck Mook* [1995] 1 CLJ 545; *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 2 CLJ 713 and *Wu Shu Chen, supra*, which may be distilled as follows:

> In order to sustain a caveat, a caveator must first pass through three stages: (i) - whether he has disclosed a caveatable interest in his application under s. 323(1) of the Code; (ii) if he has established a caveatable interest, then, whether the evidence produced in support of his claim discloses a serious

question to be tried; and (iii) if both questions are resolved in the caveator's favour, then whether the balance of convenience or justice, lies in favour of the caveat remaining on the register pending the disposal of his suit.

See also *Medan Juta Sdn Bhd v. Tsoi Ping Kwan* [1996] 1 MLJ 864; and *Pembangunan Wang Kita Sdn Bhd v. Fry-Fry Marketing Services Sdn Bhd* [1998] 2 CLJ Supp 96, 104.

The answer is found by examining the grounds of application for the entry of the private caveat as stated in the statutory declaration affirmed by the defendant, in particular para. 2 thereof, to the effect that she was one of the beneficiaries to the land pursuant to the agreement.

Section 323(1) provides for the person or body at whose instance a private caveat may be entered, *viz* any person or body claiming title to, or any registrable interest in, any alienated land or any right to such title or interest. From the wording of s. 323(1)(a), it is my considered view that one of the following persons or bodies may enter a private caveat, *viz*:

(i) any person or body claiming title to any alienated land;

(ii) any person or body claiming any registrable interest in any alienated land;

(iii) any person or body claiming any right to such a title ie, title to any alienated land; or

(iv) any person or body claiming any right to such interest ie, registrable interest in any alienated land.

In addition, s. 323(1)(b) enables the entry of a caveat by any person claiming to be beneficially entitled under any trust affecting any such land.

So long as there exists a valid agreement for the sale of land, the purchaser is entitled to lodge a caveat to protect his rights under the contract and to sue for specific performance of the agreement: *Macon Engineers Sdn Bhd v. Goh Hooi Yin* [1996] 2 MLJ 53, 54 and 55.

In cases in which the removal of a private caveat is called into question, the subject matter to be protected is land. So where the caveat was entered by a purchaser pursuant to a sale and purchase of land, the caveat was allowed to remain: *Kasivisvanathan Chettiar v. Pereira* [1976] 2 MLJ 110 FC, and *Malite Sdn Bhd v. Abdul Karim Bin Gendut* [1981] 2 MLJ 29 FC.

The Federal Court in *Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd* [1992] 1 MLJ 263 and the Court of Appeal in *Kho Ah Soon v. Duniaga Sdn Bhd* [1996] 2 CLJ 218 also emphasised that the essential subject matter therein was land.

It is clear to me that the defendant has crossed the first hurdle ie, that he has a caveatable interest under s. 323(1)(a) or (b).

That being the case, I shall proceed to consider whether the defendant has shown that on the affidavits filed, his claim raises a serious question to be tried. This would depend on whether the agreement is specifically enforceable in order to entitle the defendant to the equitable remedy of specific performance. This is indeed a serious *bona fide* question to be tried and it can only be resolved at the conclusion of the hearing of the civil suit by way of mature consideration of *viva voce* evidence after cross-examination and re-examination of the witnesses.

Since the defendant has crossed these two hurdles, the third and final hurdle is for the defendant to show that the balance of convenience or justice lies in favour of the caveat remaining on the register pending the disposal of the civil suit. In my view, in order to maintain the substratum and subject matter of the civil suit, clearly the balance of convenience or justice lies in favour of the caveat remaining on the register pending the final disposal of the civil suit.

Conclusion

I am unable to accept the plaintiff's contention that the private caveat should be removed. I hold that the plaintiff's application to remove the private caveat is devoid of merits and is hereby dismissed.

Other Grounds

I do not feel the need to go into other grounds raised by the learned counsel for the parties herein, except to record my commendation for their efforts.

Costs

As the defendant's contention on the plaintiff's lack of *locus standi* has been overruled, and the plaintiff's application to remove the private caveat has been dismissed, the position of the parties herein had been placed in equilibrium in so far as costs are concerned. I therefore order that the parties are to bear their own costs respectively.